

Ch. 1 Annotation: Constitutional Law

As taken from the textbook *Media Law & Ethics*

More than 220 years ago, the authors of the U.S. Constitution debated numerous proposed provisions, few of which actually survived to become incorporated into the final draft. The general consensus among the delegates indicated that only a strong central government could overcome the serious problems that quickly doomed the Articles of Confederation. Although there was some strong disagreement, the representatives as a whole felt that such a strong central government had the best chance of maintaining unity and coordination among the individual states and commonwealths. However, the conveners felt even more strongly that no one interest or person, including the head of state, should be accorded supreme authority over the federal government. Thus, a separation of powers, similar to the structure already established in a majority of the constitutions of the 13 original states, was created.

The idea of branches of government acting as checks and balances on one another had wide support at the constitutional convention in 1787. It still can claim strong backing today, but the implementation of that concept is as controversial now as it was then. Those concerns today are expressed in the form of complaints about gross inefficiency and erosion of states' rights and individual liberties. The seriousness with which the U.S. Supreme Court approaches the balance of powers was brought into sharp focus in 1998 when the Court struck down the Line Item Veto Act of 1996 as unconstitutional. In *Clinton v. City of New York* (1998), the justices ruled six to three that the Act violated Article I, §7 (the Presentment Clause) of the United States Constitution. Under the Presentment Clause, "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States" for approval or disapproval. If the President disapproves a bill, he has to veto it so it can be "returned" to the two houses so they can have the opportunity to override the veto by a two-thirds vote. The Court said the Constitution requires the return of the entire bill, not individual items of "new direct spending" that the Line Item Veto Act allowed. Thus, line item veto authority could be delegated to the President, according to the Court, only through an amendment to the Constitution.

The Constitution both limits and defines the powers of federal government, but it is principally an outline of the structure, powers, limitations, and obligations of government. Most of the details are left to statutory, common, and sometimes equity law. The first ten amendments to the Constitution, commonly known as the Bill of Rights, clearly have had the most significant impact on individual privileges such as freedom of speech, freedom of the press guaranteed by the First Amendment, and freedom of religion.

The academic and professional debate over any significance of the position of the First Amendment in the Bill of Rights (i.e., whether first in line means that freedom of speech, press, and religion take priority over other rights in the Constitution when there is real conflict) has been intense in the past several decades. According to the general view of the U.S. Supreme Court during the so-called Burger era (when Warren Burger was Chief Justice of the United States, 1969–1986) and later during William H. Rehnquist's tenure (1986–2005), First Amendment rights are not to be favored over other individual rights granted in the Constitution. That view has generally continued under current U.S. Chief Justice John Roberts, who assumed

office in 2005, even though new justices have joined the Chief Justice on the Court, including Samuel Alito (nominated by President George W. Bush in 2006); Sonia Sotomayor, the first Hispanic member of the court (nominated by President Barack Obama in 2009); and Elena Kagan (nominated by President Barack Obama in 2010).

When Associate Justice Antonin Scalia died unexpectedly in early 2016, then-President Barack Obama nominated Merrick Garland the next month to succeed Scalia. Garland was the Chief Judge of the U.S. Court of Appeals for the D.C. Circuit. Within hours of Scalia's death, Senate Majority Leader Mitch McConnell (R-Ky.) had made it clear that no nominee would be considered by the Senate until the next President took office. Garland's nomination languished for 293 days until Congress officially adjourned on January 3, 2016, leaving the nomination of Scalia's replacement to President Donald Trump. On April 8, 2017 President Trump's nominee, Tenth Circuit U.S. Court of Appeals judge Neil McGill Gorsuch, succeeded Justice Scalia on the Court.

The Bill of Rights did not even become an official part of the Constitution until December 15, 1791, more than three years after the Constitution became official and more than two years after the first U.S. Congress had convened, the first President had been inaugurated, and a federal court system with a Supreme Court had been created by Congress. Under Article V of the U.S. Constitution, amendments are added through a two-stage process: the proposing of amendments and their ratification. They may be proposed in one of two ways: (1) by a two-thirds vote in each house of Congress or (2) if two-thirds of state legislatures (currently 34 states) petition Congress to call a convention for the purpose of proposing amendments, Congress would be required to hold such a convention. All 27 amendments to the Constitution have been proposed by Congress. This nation has held only one constitutional convention. Moving to the next phase, amendments can be ratified by two methods: (1) by approval of three-quarters (38) of state legislatures or (2) by approval of three-quarters of state conventions. Congress selects which method of ratification will be used and has chosen state conventions on only one occasion, to approve the Twenty-First Amendment to repeal prohibition ratified in 1933. Congress was concerned that state legislatures that were often dominated by rural interests would not agree to repeal prohibition. It is important not to confuse a single, national convention to propose amendments that would be called if 34 states petitioned Congress with conventions in each state to ratify amendments that Congress has the option of requiring regardless of how amendments are proposed.

The last amendment to the Constitution to be ratified was the Twenty-Seventh Amendment in 1992: "No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." This amendment was one of the 12 articles proposed by Congress in 1789, ten of which were ratified by the states and became the Bill of Rights. It forbids Congress from passing any pay raise or decrease that would take effect before the next election of the House of Representatives. Michigan signed on as the necessary 38th state for ratification on May 7, 1992, more than 200 years after the amendment was originally proposed. Four other amendments without specific deadlines are awaiting ratification, including one calling for a new constitutional convention that has now been approved by 32 of the required 34 states although three have rescinded their approvals. Prior

to 1992, the Twenty-Sixth Amendment was the last to get the nod. It forbids states and the federal government from denying any citizen 18 years of age or older the right to vote in state and federal elections. All attempts to amend the Constitution since 1971 have been unsuccessful, including the so-called Equal Rights Amendment (“Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex”), which died in 1982 when it fell three states short of the 38 required for ratification within the time frame (including one extension) specified by Congress. Under the U.S. Constitution, Article II, Section 1, Clause 3, as modified by the 12th Amendment (ratified in 1804), provides for the election of the President and Vice President through the Electoral College rather than by popular vote. In the vast majority of elections, the President and Vice President who won the electoral vote (currently at least 270 votes) also won the popular vote, but there have been five exceptions, most recently in 2000 and 2016. In 2016, President Donald Trump defeated Hillary Clinton 306–232 in the electoral vote but lost the popular vote by slightly less than 2.9 million votes.

Over the decades, including following both the 2000 and 2016 elections, there was some discussion about a Constitutional Amendment to elect the President and Vice President by popular vote, but those discussions quickly died.